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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SCOTT NOEL VERSE, Plaintiff and Appellant, v. CITY OF SEBASTOPOL et al., Defendants and Respondents.	A106653 (Sonoma County Super. Ct. No. SCV-232705)

INTRODUCTION

Sebastopol Police Officer Scott Verse appeals from a judgment of dismissal after the trial court sustained without leave to amend a demurrer to his first amended complaint alleging employment discrimination and invasion of privacy.

BACKGROUND

On May 22, 2003, Verse filed a complaint against the City of Sebastopol, its police department, and its police chief, Gordon Pitter (collectively, City), alleging six causes of action: medical discrimination (Fair Employment and Housing Act [FEHA], Gov. Code, § 12900 et seq.),[1] violation of the state constitutional right to privacy (Cal. Const., art. I, § 1), common law invasion of privacy, statutory invasion of privacy (Confidentiality of Medical Information Act [CMIA], Civ. Code, § 56 et seq.), violation of federal constitutional right to privacy (42 U.S.C. § 1983), and negligence.

[1] Unless otherwise indicated, all statutory references are to the Government Code.

The major factual allegations were these: Verse joined the Sebastopol police force in 1981. In 1997, he was diagnosed with chronic active autoimmune hepatitis, an inherited liver disease. In 2002, he took three months unpaid medical leave and also long-term disability leave. When he was ready to return to work in July 2002, Chief Pitter requested a doctor's letter stating that Verse was ready, willing and able to resume his duties. Although he produced such a letter, Verse was given a light duty assignment, and ordered to undergo a physical fitness examination, which other officers did not have to do upon *their* return to duty. Verse was told he was eligible for promotion, but had to produce his medical records for City's doctor. He objected, but brought to the medical exam a modified medical release form narrowly tailored to meet City's needs while protecting his privacy. Eventually, under threat of termination, Verse complied with the demand to "reveal his private medical records." He then filed a government tort claim (§ 900 et seq.) and a complaint with the Department of Fair Employment and Housing (DFEH) (§ 12960 et seq.), from which he obtained a right-to-sue letter.

City demurred to Verse's complaint on the grounds that all his claims were barred by both discretionary immunity (§§ 815.2, subd. (b) & 820.2) and the exclusive remedy provisions of the Workers' Compensation Act (Lab. Code, § 3601 et seq.), and that each claim failed to state facts sufficient to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)). After a hearing, the trial court sustained the demurrer with leave to amend, and granted City's motion to strike punitive damages.[2]

Verse's first amended complaint alleged the same causes of action as the original, except that he substituted unlawful employment practice (California Family Rights Act [CFRA], § 12945.2)[3] for his original negligence claim. He also alleged the following additional facts: In 1998, his hepatitis necessitated a three-month long-term disability leave, from which he returned to his position with only his physician's certification. In 1999, he was on long-term disability leave for six months with a skin disease. When he

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[2] This motion does not appear to be in the record before us.

[3] This FEHA section and section 19702.3 (family care leave) constitute the Moore-Brown-Roberti Family Rights Act. (§ 12945.1.)

returned to work with his doctor's certification in 2000, Pitter said he had to submit to a fitness-for-duty exam and "made illegal inquiries" about his liver condition. Verse agreed to the exam, but "refused to disclose the medical release of all his records." Pitter unsuccessfully questioned Verse's skin doctor about his immune/liver disease. Verse returned to work without revealing his medical records, but believes Pitter retaliated against him by removing him as instructor in a training program.

As to the events of 2002, which were set out in his original complaint, Verse additionally alleged that when he finally returned to work, he was told his employment was conditional and he would be reevaluated in 30 days. His promotion to sergeant was withheld for two weeks. Pitter "set about a systematic plan of retaliation and exclusion" by canceling Verse's training programs, denying him vacation time, and changing his job responsibilities and/or excluding him from promotion.

City demurred on the same grounds as before, and additionally asserted that as to the new sixth cause of action, Verse had failed to exhaust his administrative remedies.[4] After a hearing, the trial court sustained City's demurrer to each cause of action without leave to amend, granted its motion to strike specified paragraphs of the complaint for failure to exhaust administrative remedies, and all prayers for punitive damages. The complaint was accordingly dismissed and judgment entered in City's favor. Verse filed a timely notice of appeal.

DISCUSSION

I. *Standard of Review*

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations." (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 732.) "On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the facts alleged in the complaint, facts that reasonably can be inferred from those expressly

[4] City apparently also moved to strike the complaint, though the record contains only a proof of service in that regard.

pleaded, and facts of which judicial notice can be taken." (*Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 525 (*Leonte*).) "However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact. [Citations.] Furthermore, any allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity." (*Consumer Cause, Inc. v. Weider Nutrition Internat., Inc.* (2001) 92 Cal.App.4th 363, 367.)

"We liberally construe the complaint to achieve substantial justice between the parties. [Citation.] In so doing, we construe the complaint in a reasonable manner and read the allegations in context. [Citation.] We determine de novo whether the complaint states facts sufficient to state a cause of action and whether the complaint or matters that are judicially noticeable disclose a complete defense. [Citations.] We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (*Leonte, supra*, 123 Cal.App.4th at p. 525.) "However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

"While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed." (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.)

II. *Individual Claims*

A. Medical discrimination—FEHA

Under the FEHA, it is unlawful (unless based on a bona fide occupational qualification) for an employer to discriminate against a person in compensation or in terms, conditions or privileges of employment because of a medical condition. (§ 12940, subd. (a).) An employer may not require a medical examination or inquire about the existence, nature or severity of an employee's medical condition unless the exam or inquiry is job-related. (§ 12940, subd. (f)(1).) It is also unlawful for an employer to discriminate against a person for opposing any practices forbidden by FEHA. (§ 12940, subd. (h).)

It is not clear whether the basis of Verse's FEHA claim is discrimination because of a medical condition or retaliation for objecting to the request for his medical records or both. On his October 2002 DFEH form complaint, he indicated that in August 2002, City discriminated against him by making impermissible non-job related inquiries because of his physical disability and genetic characteristic. In the space provided for the reason given for the allegedly discriminatory action, he wrote that Chief Pitter "gave a direct order to me to reveal my medical file to his agents after I told him I did not want to." In the first cause of action of his first amended complaint, entitled "Medical Discrimination," Verse alleged that as a result of asserting his "lawful rights," he was forced to reveal his private medical records to unauthorized people even though other employees did not, and that due to his perceived health status, he suffered lost earnings and discriminatory treatment. In his appeal brief, he suggests the alleged discrimination also included the fitness exam requirement.

The trial court sustained City's demurrer because the first cause of action "still does not state any adverse employment action within the meaning of Government Code § 12945.2(k)." Although the first cause of action is not based on that code section (see *post*, part II.E.), Verse does not dispute that adverse employment action is an element of *any* employment discrimination claim under section 12940, subdivision (a) (see *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254-256).

There is scant state authority defining "adverse employment action" under the FEHA. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454 (*Akers*).) After surveying cases construing the analogous federal antidiscrimination statute, the *Akers* court concluded that "an action constitutes actionable retaliation only if it had a substantial and material adverse effect on the terms and conditions of the plaintiff's employment." (*Id.* at p. 1455; see also *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 512 (*Thomas*) [substantial and detrimental effect on employment].) "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers, supra*, at p. 1455.)

On appeal, Verse asserts that he alleged four adverse employment actions: refusal to allow him to return to work for two weeks despite his doctor's certification he was fit for duty, restriction of his duties and employment opportunities, denial of a promotion to Lieutenant, and threat of termination if he did not release his medical records. Although he relies on retaliation rather than discrimination cases (*Akers, supra*, 95 Cal.App.4th at pp. 1452-1457 [sufficient evidence to support jury finding of employer retaliation for plaintiff's complaints of gender/pregnancy discrimination]; *Thomas, supra*, 77 Cal.App.4th at p. 509-510 [employer's demurrer to complaint alleging retaliation for employee's charge of racial and sexual discrimination properly sustained without leave to amend]), Verse does not here claim retaliation, but rather asserts that his medical condition was the "motivating reason" for these actions.

Be that as it may, the trial court struck almost all the paragraphs of Verse's complaint that he cites as containing the requisite allegations of adverse employment actions. Verse has not challenged this ruling on appeal. "Because the trial court's judgment is presumed to be correct [citation] and the burden is therefore on plaintiff to demonstrate the court's error [citation], we do not consider the issue on this appeal." (*Spitler v. Children's Institute International* (1992) 11 Cal.App.4th 432, 442.) In the two remaining paragraphs, Verse alleges that on August 19, 2002, under protest and "pain of termination," he complied with Pitter's order that he "participate in" a medical examination and reveal his private medical records.

Verse takes a somewhat different approach in his reply brief, claiming he alleged lost wages and overtime in retaliation for his refusal to produce his medical records.[5] The specific retaliatory actions were: preclusion from returning to work for two weeks after providing his doctor's certification, altered work assignment and denial of training programs, delay in promotion until he provided medical records, and the threat of termination "if he did not give up his privacy." In the only two newly-cited paragraphs of his complaint that were not stricken by the trial court, he alleged that upon returning from his 2002 medical leave, he was assigned light duty consisting of secretarial tasks until he could obtain medical clearance, and that a pending promotion was made contingent on production of his medical records.

None of the actions Verse has alleged is so egregious as those found to constitute adverse employment actions in the case on which he relies. In *Akers, supra*, 95 Cal.App.4th at pages 1456-1457, there was evidence that a deputy district attorney received a retaliatory performance review and counseling memorandum so negative as to be a possible "career ender." The court found a jury could reasonably conclude that had she not left the office because of the severe damage to her reputation, she would have been precluded from working in the areas of her interest and expertise, and would not have been promoted to the next level as long as the current leadership was in office. In short, because she complained, "key decision makers of the district attorney's office intended to substantially and materially obstruct [her] prosecutorial career" and would have done so had she remained in the office. By contrast, Verse effectively alleged (see *ante*, re stricken allegations) only that, briefly and temporarily, he was assigned light duty and his promotion was postponed. Verse offers no citable authority[6] for his

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[5] "Points raised in a reply brief for the first time generally will not be considered. [Citations.]" (*Kaichen's Metal Mart, Inc. v. Ferro Cast Co.* (1995) 33 Cal.App.4th 8, 17.)

[6] Verse's repeated reference to *Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, review granted June 11, 2003, S115154, is puzzling, since he himself notes that review has been granted, which precludes citation (Cal. Rules of Court, rule 976(d)).

suggestion that the alleged threat of termination that convinced him to comply with the request for his medical records constitutes an adverse employment action within the FEHA's meaning.

B. Right to Privacy—California Constitution and Common Law

Privacy is one of the inalienable rights enumerated in article I, section 1 of the California Constitution. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 15 (*Hill*).) The elements of a cause of action for violation of this right are: a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by defendant constituting a serious invasion of privacy. (*Id.* at pp. 39-40.) Both intrusion into private matters and public disclosure of private facts violate common law privacy protection and give rise to tort liability. (*Id.* at p. 24.) To be actionable, the intrusion or disclosure must involve conduct that would be "highly offensive to a reasonable person." (*Id.* at p. 25.)

In his second and third causes of action, Verse claimed violations of his constitutional and common law privacy rights, based on City's requirement that he disclose medical records he considered private. The trial court sustained City's demurrer on the ground that Verse alleged no facts to establish a substantial invasion of privacy. "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra*, 7 Cal.4th at p. 37.) The three "threshold elements" set out in *Hill* permit courts to weed out claims that involve insignificant or de minimis intrusions not requiring explanation or justification. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 (*Loder*).)

Verse contends that common sense suggests "intrusion" into a person's medical records is not insignificant or de minimis, citing the CMIA (see *ante*, p. 1) and the physician-patient privilege (Evid. Code, § 990 et seq.). While these statutes illustrate the existence of a legally protected privacy interest in one's medical records (see *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440), they shed no light on the seriousness of the intrusion in this case. Verse's reliance on *Jeffrey H. v. Imai, Tadlock & Keeney* (2000)

85 Cal.App.4th 345 (*Jeffrey H.*) is also misplaced. In that case, a defense law firm's unauthorized disclosure of improperly obtained evidence of plaintiff's HIV-positive status in an arbitration proceeding to which it had no relevance was held to be a sufficiently serious invasion of privacy to satisfy *Hill*'s third prong. (*Id.* at pp. 354-355.) The court reasoned that "unauthorized disclosure of HIV-positive test results undermines the 'public interest' in encouraging patients to submit to HIV testing and to make needed disclosures of HIV-positive status during medical treatment. Additionally, the pleadings here suggest the disclosure of private information in a manner tending to compromise appellant's right of access to the courts." (*Id.* at p. 355.) Common sense indicates that neither of these policy considerations enters into the determination of whether revelation of unspecified medical records to one physician in the context of a fitness-for-duty exam is a serious invasion of privacy.

In the remainder of his discussion of *Jeffrey H.* and in his reply brief, Verse focuses on the reasonable-expectation-of-privacy factor, and the balancing of interests once all three threshold elements have been established (*Hill, supra*, 7 Cal.4th at p. 37), none of which bears on the trial court's finding in this case that Verse's pleading failed to allege a serious invasion of privacy.

C. Statutory Medical Privacy—CMIA

The CMIA "protects medical patients' right to privacy in their personal medical information, and specifically sets out a cause of action for compensatory and punitive damages for patients whose medical information has been improperly disclosed." (*Jennifer M. v. Redwood Women's Health Center* (2001) 88 Cal.App.4th 81, 92.) In his fourth cause of action, Verse alleged that Chief Pitter's request that he reveal his medical records to the examining physician violated the CMIA. The trial court found Verse had failed to plead facts showing that City improperly used or disclosed his medical information (Civ. Code, § 56.20, subd. (c)).[7] Contrary to Verse's suggestion, the

[7] This subdivision provides, "No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer

allegation that, "As a result of Plaintiff's opposition to Defendant's request to reveal his medical records, Plaintiff was ordered to reveal his medical records" to its examining physician, is not an allegation that his employer ever possessed, much less used or disclosed medical information about him.

In his reply brief, Verse reframes his CMIA claim, suggesting for the first time (see *ante*, fn. 5) that City discriminated against him for failing to authorize release of his medical records, in violation of Civil Code section 56.20, subdivision (b), which provides, "No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part." He never alleged, however, that he was asked to or refused to sign an authorization for the release of medical information by a provider of health care (§ 56.11) or an authorization for an employer to disclose medical information (§ 56.21), nor that, as he now asserts, Pitter required him to submit to a medical exam upon his return from his 2002 medical leave in *retaliation* for an earlier refusal to sign any such authorization (see *Loder, supra*, 14 Cal.4th at p. 861).

D. Right to Privacy—Federal Constitution and 42 U.S.C. Section 1983

In his fifth cause of action, Verse alleged that violation of his federal constitutional right to privacy entitles him to relief under 42 United States Code, section 1983, which permits a civil action for deprivation of such rights under color of law. The trial court found the complaint "does not allege any valid constitutional violation of privacy, thus, no § 1983 claim can be stated."

On appeal, Verse does not separately address this ruling, but asserts that it has the same basis as the ruling on his state constitutional and common law invasion of privacy claims, i.e., failure to allege a *serious* invasion of privacy. To the extent this is true, we must affirm the ruling on his fifth cause of action for the reasons set out in Part II.B. with regard to the second and third. It is also possible the court meant that Verse did not

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possesses pertaining to its employees without the patient having first signed an authorization . . . permitting such use or disclosure."

allege a violation of a federal constitutional right that would entitle him to relief under section 1983. (*Loder, supra*, 14 Cal.4th at p. 893 [federal constitutional privacy claims analyzed under Fourth Amendment or due process clauses of Fifth or Fourteenth amendments]; *Hill, supra*, 7 Cal.4th at p. 31 [same].)

E. Unlawful Employment Practice—CFRA

The sixth cause of action in Verse's first amended complaint is entitled "Unlawful Employment Practice - Government Code Section 12945.2 California Family Rights Act." Section 12945.2, subdivision (a) provides that "it shall be an unlawful employment practice for any employer . . . to refuse to grant a request by any employee with more than 12 months of service . . . and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave." Family care and medical leave includes leave because of an employee's own serious health condition. (§ 12945.2, subd. (c)(3)(C).) It is also unlawful for an employer to discriminate against any individual because he exercises the right to family care and medical leave. (§ 12945.2, subd. (*l*)(1).)

Under this rubric, however, Verse did not allege that he was ever denied medical leave, nor does he refer again to section 12945.2 or the CFRA. Instead, he alleged that the requirement that he submit to a physical exam including production of his medical records before returning to work after taking such a leave violates *other* FEHA anti-discrimination provisions, specifically sections 12940 and 12945 (governing pregnancy, childbirth or related medical conditions).[8] (See *ante*, pp. 5-6.)

The trial court sustained the demurrer without leave to amend on two grounds: (1) Verse did not allege, nor assert in his opposition to the demurrer, that he actually provided 1,250 hours of service immediately prior to taking his medical leave, a necessary element of a CFRA cause of action (see *ante*); and (2) the claim is not reflected

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[8] It is possible that the reference to section 12945 in paragraph 68 of Verse's complaint actually means section 12945.2, subdivision (k)(4) (employer "may have a uniformly applied practice or policy" requiring health care provider's certification that employee is able to resume work after leave taken for his own serious medical condition).

in Verse's governmental tort claim, which alleges only non-job related inquiries. Recognizing that a claim for violation of the FEHA need not be supported by a government tort claim (*Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 863), the court ruled that the scope of a FEHA civil complaint is nonetheless limited to the specific allegations in the DFEH complaint,[9] citing *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1729 (plaintiff did not exhaust administrative remedies as to claims of sexual discrimination, harassment and retaliation, when only age-discrimination claim was before DFEH). Finally, the portion stricken from the first amended complaint (see *ante*, p. 3) includes all eight paragraphs of the sixth cause of action.

It is not easy to determine the bases of Verse's challenge to the trial court's ruling on his sixth cause of action. After a review of his primary contention (employers are not entitled to unfettered access to employees' medical information), with references to section 12940, subdivision (f) (see *ante*, p. 5), section 12945.2, subdivision (k)(1) & (3), outlining the procedure for dealing with an employee's *request* for medical leave (which is not at issue here), and section 12945.2, subdivision (k)(4) (*ante*, fn. 8), he turns to the court's actual ruling.

First he argues, based only on the assertion that in *Murphy v. BDO Seidman* (2003) 113 Cal.App.4th 687, a plaintiff was allowed to amend his complaint more than five times, that in the face of the court's confusing ruling, he should be allowed to amend his complaint to cure any errors. "The burden is on the plaintiff, however, to demonstrate the *manner* in which the complaint might be amended." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742, italics added.) We note, moreover, that the court's confusion may well have been engendered by the confusing nature of Verse's claim. In any event, we reject Verse's implied invitation to add to the confusion by reviewing the court's tentative ruling and/or its remarks at the hearing.

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[9] It is in fact this document, not Verse's government tort claim that alleges only non-job related inquiries.

Second, Verse challenges the court's reliance on the exhaustion of remedies rationale for both sustaining the demurrer to his sixth cause of action and striking all its constituent paragraphs. (See *ante*, p. 12.) Claimants need not specify the charges submitted to an administrative agency "with literary exactitude." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 381 (*Soldinger*).) Verse's case is distinguishable, however, from those he cites: *Martin v. Fisher* (1992) 11 Cal.App.4th 118 (plaintiff's superior, named as perpetrator of harm in body but not caption of administrative complaint against corporate employer, properly named defendant in civil suit); *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 858-859 (failure to check "national origin" box on administrative complaint claiming disparate treatment because he was "Asian" not fatal to "race and/or national origin" discrimination complaint); *Soldinger, supra*, at pp. 380-382 (DFEH claim of retaliation for filing previous religious discrimination charge sufficiently like or related to civil complaint of retaliation for bringing initial religious discrimination lawsuit, but see *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 [DFEH charge of race and national origin discrimination cannot support additional claim of retaliation for filing DFEH charge]); *Mora v. Chem-tronics, Inc.* (S.D.Cal 1998) 16 F.Supp.2d 1192, 1201-1202 (*Mora*) (on DFEH discrimination claim form, CFRA plaintiff said he was fired because of family and son's illness, but did not check "family leave" or "retaliation" boxes).

Verse asserts that "impermissible non-job related inquiry," the item he checked off on his DFEH claim, is "the essence" of his sixth cause of action. But it is *not* the essence of a CFRA claim. That item and Verse's additional notation that he was ordered to reveal his medical file may indeed "embody the entire lawsuit," as he says, but they do not embody a CFRA claim. As indicated (*ante*, p. 11), the essence of such a claim is denial of medical leave to an eligible employee, which Verse did not and cannot allege. To the extent he meant to claim discrimination under section 12945.2, subdivision (*l*)(1), all he had to do was check off "other" in the section of the form that asks the cause of the

alleged discrimination, and specify "exercise of right to medical leave" in the allotted space.

In fact, most of the confusion about Verse's sixth cause of action seems to have resulted from his belatedly having slapped a CFRA label on his first, FEHA, cause of action, without bothering to allege the requisite statutory elements, including but not limited to the one singled out by the trial court: at least 1,250 hours of service with the employer during the previous 12-month period. That omission alone is sufficient to sustain City's demurrer to the sixth cause of action.

In his reply brief (see *ante*, fn. 5), Verse asserts that the trial court abused its discretion by denying him leave to amend his sixth cause of action because he "obviously" met the statute's employment requirements, and he can "certainly make plain any omitted language by adding that [he] worked 1,250 hours prior to taking leave." But this was no mere oversight, easily corrected by amendment. Even here, whether inadvertently or by design, he fails to assert that he could allege that he worked 1,250 hours "during the previous 12-month period" (i.e. during the year before his medical leave) as the statute requires (see *ante*, p. 11), even though the trial court *underlined* the words "immediately prior" in its ruling on this point.

The trial court did not abuse its discretion by sustaining the demurrer to Verse's sixth cause of action, which is essentially the same as his first, asserted under a different, more specific FEHA provision, without any attempt to allege the factual elements of that claim.

Because we conclude that each claim failed to state facts sufficient to state a cause of action, we need not address City's contentions that the claims were barred by governmental discretionary immunity or the exclusive remedy provisions of the Workers' Compensation Act.

DISPOSITION

The judgment is affirmed.

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Kay, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.